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THE INDIVIDUAL AND THE STATE

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There is an unwritten and unformulated, but none the less coercive principle that governs the conduct of learned societies when assembled in full council which imposes certain limitations upon the president's address. One of these limitations is that the address shall deal in broad outline with some comprehensive or fundamental topic rather than attempt a detailed examination of a special subject. It is in conformity with this requirement that I have selected my subject for this evening. I shall speak of the various interpretations which the relation of the individual to the state has received.

This topic has furnished material for political and social speculation since the time when men began to be curious regarding their own rights and responsibilities. It may seem, therefore, futile to attempt to shed any new light upon such an ages-old inquiry. In truth, however, new conditions of life and new modes of thought give an altered significance to the question, and, therefore, justify, from time to time, its fresh examination. And, even if this were not so, it is worth while, in every department of

thought, occasionally to revert by way of review to fundamental principles. Webster, in his second speech on Foote's Resolution, in reply to Hayne, begins by saying: "When the mariner has been tossed for many days in thick weather, and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course. Let us imitate this prudence, and, before we float farther on the waves of this debate, refer to the point from which we departed, that we may at least be able to conjecture where we now are." So similarly, it seems to me, we may with profit seize this season when we are gathered together in a national meeting, to bring once more before us this fundamental question of the relation in which the individual may be conceived to stand to the political authority by which he is governed.

The bond which unites the subject to his sovereign, the citizen to his state, may be viewed in two aspects—aspects which are so distinct as to furnish independent inquiries. In the one the bond is viewed as a legal ligament, and the question as to its precise characteristics falls within the field of constitutional law, or, when more abstractly treated, of analytical jurisprudence. This, the more technical phase of the subject, I shall not consider. The second aspect, and the one with which I shall be concerned, is that which examines the question as one of ethical obligation—of the moral obligation of obedience upon the part of the individual, and of the right to exercise coercive authority upon the part of the state. Upon the answers given to the question thus conceived depend, as corollaries, the extent and mode of exercise of legitimate political control. The topic thus broadens out into an examination of the premises of a final political philosophy.

Of the various theories which have been put forth in ethical justification of political authority among men, the chief are: the divine, the natural or instinctive, the force, and the social compact theories. Of these, the best known, as well as the most influential, is the last, especially as it finds statement in the writings of Locke and Rousseau. Aside from other errors either in premises or reasoning the fundamental defect of this compact theory, is that

it starts from the conception that man, as an individual and as apart from society or the state, is the possessor of rights, or at least of interests, which it is the primary province of political authority to protect and secure the realization of. Rousseau made a great advance in the theory by distinguishing, on the one hand, between the general interests of the social whole, and the *volonté générale* which seeks those interests, and, on the other hand, the particularistic interests of the individuals and the *volonté de tous* constituted of the arithmetical sum of the individual wills as declared by those interests. His general will, while thus conceived of as compacted of individual wills, was, however, composed of individual wills purged of their particularity and selfishness, and expressed in social terms. Nevertheless, his ethical, and therefore his political system, exhibited the fundamental defect that these individual rights and interests were viewed as arising out of the instinctive or emotional desires of man, rather than as determined by his inherent rationality and moral nature. Kant corrected this defect, and, founding his ethical system upon the rationality of man, traced the moral law to the human practical reason as its source. "Obligation," he declared, "is the necessity of free reason when viewed in relation to a categorical imperative of reason." Kant still clung, however, to the idea that conflicting individual wills and interests need to be harmonized by some such mechanical means as a real or conceived compact between individuals. He had, apparently, no conception of the social or political society as a unity with an existence and interests of its own.

Modern ethical theory, while not abandoning the fundamental principle stated by Kant that the reason of the individual is, in the ethical field, legislatively autonomous, finds no inherent conflict between individual interests, or between those interests and the general welfare, such as requires for its solution a social or political agreement.

This modern doctrine, which is the final result of political idealism, can, perhaps, be made somewhat plainer by contrasting it with other and earlier conceptions of the relationship between the state and the individual.

Looking back over the history of political thought, we find that, roughly speaking, the relation of the individual to the state has been viewed in four aspects. These we may designate by the names, the Hellenic, the Oriental, the Individualistic and the Modern.

Paradoxical as it may seem, the Greeks, or at least the Athenians, were able to recognize in their political philosophy as it found statement in the writings of Plato and Aristotle the independent value of the personality of the citizen, and at the same time to subject him to the absolute control of the state. According to this Hellenic conception, man is by his very nature a social being. Hence, they held, his life in a state of society, with its social conventions and demands, means, not an interference with an original independence, but a condition of life necessary to man's very existence as an independent rational being. To the Greeks, in other words, society and the state were viewed as immediate products of great nature conceived of as creative and volitional. The state had, indeed, in their eyes, in a sense, a higher and more perfect individuality and personality than had its citizens, for it was from its personality and from its life that the citizen was supposed to derive all that was valuable to him as a man. This apotheosis of the state was carried to such a degree that the doctrine of the immortality of the state received more emphasis by Greek ethical thinkers than did the question as to the possibility or probable conditions of a life hereafter for mankind. The state's life was eternal, and man's highest aim was conceived to be the contribution of what lay within his power to render that life as glorious as possible. It is probably true that the Orphic, Eleusinian and other mysteries taught a more personal immortality than this, together with a system of future rewards and punishments, but the general doctrine was that which has been described.

The consequence of this view of the relation between the state and the individual was that while the individual had many rights he had none as opposed to the state.

The Oriental conception of the state as well as that of the Greeks subordinated the individual wholly to the state. There was, how-

ever, this fundamental difference which distinguished it from the Hellenic view. While the Oriental looked upon his subjection to the law and to the state as an obedience due to an external power, the Greek saw in it but a yielding to a higher self—to a power of which he himself was a part. What in the oriental world was thus subjection, was, in the Greek world, self-surrender. President Wheeler, in his *Life of Alexander the Great*, states the distinction which I have been attempting to make, in the following manner: "To the Oriental," he says, "the universe as well as the state is conceived of as a vast despotism, which holds in its keeping the source and the law of action for all. Its mysterious law, held beyond the reach of human vision, like the inscrutable life of the autocrat, is the law of fate. Personality knew no right of origination or of self-determination; it was swept like a ship in the current. It knew no privileges except to bow in resignation before the unexplained, unmoved mandate of fate. The Oriental government of the universe was transcendental; the Hellenic, social."

The individualistic phase of political thought was represented in the philosophy of the seventeenth and eighteenth centuries, and was a direct outcome of the central idea of the Protestant Reformation according to which the individual is given the right of passing final judgment as to the meaning of the law. It is true that Luther's mission was to declare simply the emancipation of man from the dogmatic absolution of the church, but in doing so a principle was necessarily asserted which freed him from unquestioning obedience to an external authority, political or ecclesiastical.

This freedom, when not controlled and tempered by a proper comprehension of the rational limitations under which it should be exercised, led, as is well known, to a gradual denial of the right of all political authority not founded on the assent—explicit or implied—of the individuals subject to it. The movement in effect assumed the form of a simple negation of the oriental idea of subjection, and, as all pure negations are apt to be, was carried over into the opposite extreme, anarchy. In political theory this individualistic philosophy reached its height in the writings of the French philosophical school of the latter half of the eighteenth

century. In political fact, it found its culmination in the anarchy of the revolutionary period.

Kant, as has been already pointed out, corrected Rousseau's doctrine of individual rights and made these rights dependent upon reason. He did not, however, completely emancipate himself from the individualistic philosophy of the eighteenth century. He did not grasp the fundamental truth that by recognizing the justice of the will of another power, the individual can make that will his very own, and thus, though obeying it, be not coerced by it. Kant thus, in fact, ever regards the control of the law as necessarily an interference with freedom, and justifiable only when employed to prevent coercion from other sources. He develops, therefore, the pure conception of a *Rechtsstaat*—a State whose sole legitimate function is to prevent the violations of those principles of rights which the reason lays down as fundamental. The State is thus dragged in, as it were, as a *deus ex machina* to secure to men that freedom to which they are rationally entitled, but which, without the State, they could not obtain.

The modern idealistic view, while recognizing the two necessary elements of self and not self, of liberty and law, harmonizes them in a higher unity without destroying either of them. Here the old Greek idea is revived, but corrected by rendering that subordination which, to the Greek, was an unthinking and almost instinctive submission, a conscious, deliberately chosen subordination. The Greek failed to reach the true view because he recognized but the one element, the will of the state. His thought involved no recognition of the two necessary elements of freedom and authority. In other words, his identification of the individual will with the will of the state was immediate.

In the modern idealistic view, on the other hand, the identification is mediate. The two ideas of absolute freedom and absolute subjection are first clearly presented in the mind and then harmonized. Thus, while still retaining the central conception of the "good will," the abstract and impossible Kantian formalism of that will is denied. In its place there is given us the conception of a self that finds its realization in the outer world, in utilizing objective forces and institutions as means for securing that de-

velopment and perfection which the reason declares. The existence of the state thus, as comprehending the most important of all those forces and facts which are necessary for man's highest life, receives the highest possible sanction. It is in this sense that Hegel speaks of the state as the "actualization of freedom" and as the "embodiment of concrete freedom."

From what has been said it will be seen that modern ethical thought makes the source of moral obligation wholly subjective. It denies the possibility of an objective or external ground of obligation of any sort whatsoever. The obligation which the human soul feels comes from the recognition of what is right. When we discover that a thing is right, the sense of obligation to seek it is given to us as an original underived feeling. "Moral obligation" as President Schurman has said, "is the soul's response to acknowledged rectitude."

Starting from this premise that, in the moral field, man is self-legislative but yet determined by the idea of a self-perfection, it is possible to harmonize absolutely the ideas of freedom and control, of liberty and law. In so far as the commands of a social or political power are recognized by the individual as necessary for the realization of his own best good, which, as we have seen, includes the good of others, such commands no longer appear to him as orders from an external power limiting his freedom, but rather as imperatives addressed to himself by his own reason. In obeying them therefore, he obeys, in fact, himself. In theory, then, it is possible to conceive of a society so perfectly organized and administered that at the same time that social subordination and obedience are demanded and obtained, the individuals are left absolutely free as being required to do only such acts as their own reason tells them are just. This conclusion is luminously stated by Professor Melone. "If we try," he says, "to form the idea of a divine society or community of men—and by a divine society I mean one that is perfect—we may, without incurring the reproach of manufacturing a Utopia, say this much of it. It must have a perfect harmony or unity of all its members, and a perfect variety; and the more intense and thorough the harmony is, the more so must the variety be. A perfect society would

have an intense oneness, but this oneness would hold amid an infinite variety of character and experience on the part of individual members. In musical art, when instruments of various kinds sound different notes, we may have a symphony which is one of the most magnificent expressions of superpersonal feeling that humanity knows: such would be the harmony of a perfect society, and such is the dream of the world."

In bringing a particular state to the bar of moral criticism, it is, then, rather its activities than its own right to existence which is questioned. The abstract and naked right of political authority itself is not in issue, for, as abstractly considered, that is, apart from any particular form of organization or manner of operation, there is no basis upon which a judgment may be founded. It is not until that authority clothes itself in governmental garments and manifests its power and authority that material is afforded to which moral estimates may be applied.

These conclusions which modern political theory, upon its idealistic side, reaches with regard to the ethical right of the state to exist, carry with them the logical corollary that no *a priori* limits may be placed upon the State's sphere of control. Each and every exercise of political control is to be justified by the results reached, or reasonably expected to be reached, by it; and the worth of these results is to be measured by the degree to which they contribute to that highest social goal which, is but a statement, in social terms, of the several goals of the individual members of the group.

The practice of modern states clearly shows the acceptance of this utilitarian conception of the proper province of political control—that the state and its government are made for man and not man for the state, and that all political agencies exist as means to to an end and not as ends in themselves. This broadening of the sphere of public authority is shown not only in the assumption by the state of the ownership and operation of public utilities, and in the increased regulation of these undertakings when they remain in private hands, but, in general, in the state's efforts to advance, through the exercise of its police powers, the physical,

moral and esthetic welfare, as well as the economic and industrial prosperity of its citizens. Finally, and most recent, and in some ways the most significant of all, are the efforts which the civilized states of the world are making to secure in some way a more just distribution of economic burdens and benefits than is realized or realizable under a régime of unrestricted competition.

The most conspicuous illustration of this is exhibited in the compulsory workmen's accident, invalidity, and old age insurance laws of foreign countries, and in the compulsory compensation and minimum wage laws of this country. This is seen when by analysis we determine what is the intent and result, for example, of the laws which compel the payment by employers of compensation to their employees injured in the performance of the work for which they are hired. These laws provide for the payment of fixed sums without regard to fault upon the part of those compelled to make them. The employer may be engaged in a business which is not in itself a dangerous one and which he has a full legal right to engage in; he may have fulfilled to the letter every requirement of the law with reference to the provision of safety devices, superintendence, etc.; he may have used an intelligent judgment in the selection and oversight of his employees, and the accident may have occurred through the negligence of the one injured (provided that negligence be not of a gross character, or the injury due to deliberate intent of the employee) and yet he must pay the compensation. It amounts in bare fact to the taking of the property of one individual and handing it to another, not as a result of an express or implied contract, nor as damages for a tort, but because it is deemed socially expedient and just that the burden of the injury be shifted from the shoulders of him upon whom it first falls, to the shoulders of another, who, of course, if general industrial conditions permit, may shift it upon the consumer or upon the public generally.

It is clear that this legislation can be ethically justified only upon the ground that it is just, as well as socially expedient, that the employer, or, ultimately, the consuming public, should bear the burden entailed by these accidents; and, furthermore, that it is the proper province of the state to see to it, through the oper-

ation of law, that, to this extent at least, what is conceived to be distributive justice is secured. And, of course, this also means, if the action is to be fundamentally justified, that certain canons of distributive justice are adopted as guiding principles.

I have used workmen's compensation legislation as illustrating the definite acceptance by a considerable number of our Commonwealths of the doctrine that it is a proper province of the state not only to raise the level of competition and thus permit individuals to contest with one another upon fair and open terms, and under conditions of life that are morally and physically satisfactory, but to secure the realization of a general scheme of distributive justice.

Personally, my sympathies are in favor of this legislation, and, so far as the question of workmen's compensation for accidents is concerned, such legislation appears to me just as well as socially expedient. I do think, however, that it should be frankly admitted that this legislation marks the assumption by the state of an authority which is distinguishable *in genere* from that under which the state regulates public services and industries affected with a public interest, as well as from that which is usually known as the police power under which the conduct of persons and the use of private property are regulated in behalf of the health, safety, morals and general convenience of the public. This, it is to be observed, does not mean the acceptance of socialistic doctrines as to the nature of private property, as to the part played by the laborer in the production of economic goods, as to his absolute right to the whole product of his labor, as to the generally oppressive operation of the wages system so far as the laborers are concerned; nor does it mean in any degree an acceptance of socialistic views as to the desirability or feasibility of an economic and political régime in which all the instruments of production are owned and operated by the public. But it does mean an acceptance of the socialist's general theory that it is the proper province of the state to do whatever it can to secure the true interests of its people, unrestrained by any *a priori* limitations growing out of the essential nature of political authority.

In the United States the adjustment to this broadened concep-

tion of what is properly the state's province has been rendered particularly difficult by reason of the fact that we have surrounded the individual's rights of life, liberty, and private property with the special constitutional guarantee that they shall not be taken away except by due process of law; and a long line of decisions has definitely determined the proposition that the due process thus guaranteed refers not simply, as the words themselves might seem to import, to a procedure in which the elements of fairness and justice are present, but that, however impeccable the process, substantive rights may not arbitrarily be destroyed or abridged.

A political or constitutional theory which considered the rights of the individual to life, liberty and property as wholly removed, upon their substantive side, from regulation by ordinary legislative act would, however, be destructive of efficient government, if not of political authority itself. It would predicate a régime of individualism that would scarcely be distinguishable from anarchy. From this legislative impasse we have been saved by the development of the doctrine of what is known as the "police power" of the State, according to which, despite other constitutional limitations, to use the words of Chief Justice Shaw of Massachusetts, "rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient;" or as declared by Justice Holmes of the federal Supreme Court, that the power "extends to all the great public needs," and that "it may be put forth in aid of what is sanctioned by usage or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." Even considerations of mere convenience to the public, it has been held, are sufficient to justify this regulation of private rights. "We hold," the United States Supreme Court has said in a recent case, "that the police power of a State embraces regulations designed to promote the public convenience and general prosperity,

as well as regulations designed to promote the public health, the public morals, or the public safety.”

Thus it has come about that the two constitutional doctrines of due process and the police power have, as it were, waged war upon one another—the one serving to restrain and the other to extend the powers of American legislatures. In my opinion, however, the utmost extension which the courts have given to the the conception of the police power of the States does not permit it to cover such an exercise of public authority as is involved in the compulsory workmen’s compensation laws of which I have been speaking; and thus the constitutional question becomes an acute one whether this legislation may escape from the inhibition of the due process of law requirement by a resort to the general legislative authority of a State to create new liabilities, or to change their incidence, or, especially, to impose liabilities irrespective of legal fault upon the part of the persons burdened by them. Whether or not the due process of law requirement will be given an inhibitory force with relation to this and similar legislation that may be enacted in the effort of the State to obtain a juster distribution of economic benefits and burdens than is secured through the operation of competitive force, will depend upon the spirit in which the courts are led to construe the limitations imposed by our Constitution upon the legislative branches of our governments.

A survey of the leading cases shows that where considerations of public administrative efficiency have been concerned, private interests or liberties have not been allowed to stand in the way. Indeed, in not a few instances, the invasions of private rights have been of the most drastic character. As illustrations of these I need only mention the authority given to our immigration officials to determine finally, and without review in the courts, the fact whether or not a person coming to our shores is a citizen of the United States and therefore entitled to land; the authority given to the postmaster-general to issue fraud orders; the authority given to public officials in the matter of assessing and collecting taxes; and, in general, the legal conclusiveness given to the determinations of administrative officials. When, however, the

question has been not one of governmental efficiency, but of the regulation of the conduct of individuals or the use by them of their property, for the realization of the legislature's conception of social justice, or what it deems to be morally desirable or economically expedient, the courts of some of our States have certainly shown a keen anxiety to maintain private rights, especially of property, and to bring them under the protecting ægis of the constitutional guarantee of due process of law, substantively considered. Has this been wise or constitutionally necessary? There can be no doubt but that the system of common law which forms the broad basis upon which our whole systems of public and private jurisprudence rest, is of a strongly individualistic character. The influences under which it developed gave to it this character; and it was this generally individualistic political and juristic philosophy which led to the incorporation into our fundamental instruments of government of the various limitations upon legislative power, among which the requirement of due process of law is included. Shall the limitations thus imposed upon legislative action be rigidly interpreted in the light of past conditions and outworn conceptions of justice and expediency, or shall they be viewed only as broad mandates to the law-makers that they shall not grant to public officials a power over private rights that may be exercised in an arbitrary or unjust manner, nor authorize any substantive deprivations of the life, liberty, or property of the individual except upon clear grounds of social justice and general welfare? Interpreted in this latter sense, no constitutional warrant will be given to governmental tyranny, or to the spoliation of one individual for the primary benefit of other individuals; but a constitutional way will be opened to the orderly performance by the state of all the functions which modern political philosophy ascribes to it.